IN THE

Supreme Court of the United States

October Term, 1967

NO. 663

NATIONAL SURETY CORPORATION, *Petitioner*

versus

THE UNITED STATES OF AMERICA for the use of WAY PANAMA, S.A., *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Petitioner has correctly submitted the opinions of the District Court and the Court of Appeals for the Fifth Circuit with reference to the above cause.

TERMINOLOGY OF REPLY BRIEF

For brevity and clarity, the Petitioner, National Surety Corporation, (a defendant and Appellant below) is hereinafter referred to as "Surety". The Respondent, The United States of America for the use of Way Panama, S.A., (plaintiff and Appellee below) is hereinafter referred to as "Way". Surety's co-defendant in the trial below, Uhlhorn International, S.A., is hereinafter referred to as "Uhlhorn, S.A." William Uhlhorn, an individual d/b/a Uhlhorn Construction Company, is hereinafter referred to as "Uhlhorn". The United States Court of Appeals for the Fifth Circuit is hereinafter referred to as "Fifth Circuit".

Reference to the Printed Record or Transcript of the case below will be (T), with the appropriate page number in such parenthesis. Reference to Surety's Appellant Brief in the Fifth Circuit will be (Sur Br), and reference to Surety's Petition herein will be (Pet), with appropriate page numbers in the blank therefore.

QUESTION PRESENTED

The seven numbered aspects (Pet 2) of the sole question before this Court can be more easily resolved if they are considered in the light of the following proposition which includes the salient facts omitted by the Petitioner:

> Where Uhlhorn, the general or prime contractor on the project, upon whose bond Surety is obligated to pay all persons supplying him with labor and materials, made an assignment of his contract rights to Uhlhorn S.A., with whom Way contracted under the express written representation by Uhlhorn, President of Uhlhorn, S.A., that Uhlhorn, S.A. was the general contractor, and for whom Way provided the

materials and labor on the project, and where such assignee, with the active joint participation of the prime contractor, performed all the functions of the prime contractor on the project, engaged and contracted in its own name with all sub-contractors, made all disbursements, kept the time records, prepared and submitted records in the name of the prime contractor to the Federal Agency, received the funds consigned by the Federal Agency to the prime contractor and applied such funds to assignee's own bank account, the acts and obligations of Uhlhorn S.A. were those of the prime contractor, and Way can recover therefor against the bond surety, without giving notice under the Miller Act to any one else.

COUNTER STATEMENT OF THE CASE

Since it is Respondent's contention herein that there is no special or important reason for review of this matter, and that in view of the abundant evidence before the trial court and appellate court, upon which their determinations were based, and which in turn make it clear that their decisions are not in conflict with the decisions of other federal courts, it is essential that the incomplete and misleading statement of the case by Surety (Pet 4) be fully controverted and supplemented. To that end, Way adopts by reference and respectfully refers this Court to the trial court's version. (T 275-278).

The trial court made the following findings of fact which are not disputed by Surety and which were further found by the United States Court of Appeals for the Fifth Circuit: (Pet Appendix A, 15, 16 & 17).

"Findings of Fact

1. The use plaintiff, Way Panama, S.A., is a corporation organized and existing under the laws of

Panama and at all times pertinent to the cause of action was licensed to do business in the Canal Zone.

2. The defendant, Uhlhorn International, S.A., is a corporation organized and existing under the laws of Panama and at all times pertinent to the cause of action was licensed to do business in the Canal Zone and maintained an office and property within the Canal Zone.

3. The National Surety Corporation is a corporation duly organized and existing under the laws of the State of New York and was licensed to do business in the Canal Zone at all times pertinent to the cause of action.

4. William Baynes Uhlhorn, doing business as Uhlhorn Construction Company, was awarded a contract by the Federal Aviation Agency entitled FA-2-1578 for the construction of the International Flight Service Station/ARTCC Building at Balboa, Canal Zone.

5. In connection with the contract mentioned, William Baynes Uhlhorn, an individual doing business as the Uhlhorn Construction Company, caused the National Surety Corporation on June 28, 1960 to issue a payment bond binding the National Surety Corporation in the penal sum of $313,454.10 for the prompt payment to all persons supplying labor and material in the prosecution of the work provided for in the said contract.

6. In the prosecution of the work in the contract, Uhlhorn Construction Company employed personnel, equipment, material, funds and the corporate entity of defendant Uhlhorn International, S.A., a corporation controlled by William Baynes Uhlhorn, indiscriminately with those of Uhlhorn Construction Company and even attempted to assign the contract to the defendant Uhlhorn International, S.A. The attempted assignment was made without the knowledge

or consent of defendant National Surety Corporation or the Federal Aviation Agency.

7. Defendant, Uhlhorn International, S.A., in the prosecution of the work under FA-2-1578 issued a Purchase Order numbered 61-100-16 on December 13, 1960 to use plaintiff under which use plaintiff furnished labor, material and equipment to the project which totaled, when change orders and revisions executed May 9, 1961 and October 2, 1962 were included, the sum of $178,884.37.

8. There is still due and owing plaintiff under the terms of the Purchase Order and change orders the sum of $23,117.92. Judgment has been entered against the defendant, Uhlhorn International, S.A., for this amount dated March 4, 1964. The figure was arrived at by agreement of counsel at pretrial conference and no proof was heard as to the amount of the claim.

9. The original complaint beginning the suit was filed on June 14, 1963 and the amended complaint was filed on July 30, 1964.

10. Work under the Purchase Order was done and materials were supplied by use plaintiff as late as August 6, 1962, the date of the departure of Robert L. Behrend, Resident Engineer representing FAA. Work continued for some time thereafter for on the departure date work was in progress and the final air balancing had not been performed nor the smudge rings installed. All work had been done and materials furnished however for more than one year before the filing of the amended complaint.

11. No written notice was given by use plaintiff to William Baynes Uhlhorn, an individual, nor Uhlhorn Construction Company; nor Uhlhorn International, S.A. before the expiration of a period of ninety days after the day on which the last labor was done or material furnished as provided in the Miller Act

(Title 40, U.S.C.A., Section 270 b) for persons dealing with a sub-contractor."

The Fifth Circuit opinion reinforces the same fact findings as follows:

"In the performance of the contract, Construction (Uhlhorn) employed the personnel and equipment of Uhlhorn International, S.A. (Pet Appendix 15)"
* * *

"After careful review of the record, we are convinced there is ample evidence to support the findings and the judgment of the district court. There are several reasons why Uhlhorn International, S.A. should be considered the same entity as Uhlhorn Construction Company and thus a prime contractor, rather than a subcontractor, with regard to the application of the notice provision. First of all, Uhlhorn himself caused Uhlhorn Construction Company to assign the FAA contract to Uhlhorn International, S.A. This assignment, although made without the knowledge or consent of Surety, squarely placed Uhlhorn International, S.A. in the position of prime contractor. Furthermore, some applications for permits to import equipment or materials without duty purported that Uhlhorn International, S.A. was the general contractor. Moreover, various contracts with subcontractors executed by Uhlhorn refer to Uhlhorn International, S.A. as the "general contractor". Finally, stationery of both Uhlhorn Construction Company and Uhlhorn International, S.A. was used interchangeably to make purchase orders with the name of one company blotted out and the name of the other substituted.

It is quite clear to us that William B. Uhlhorn operated in the form of Uhlhorn Construction Company and Uhlhorn International, S.A. whenever it suited him. We conclude that with respect to the per-

formance of the FAA contract the two concerns were operated essentially as one entity, namely, the prime contractor." (Pet Appendix 16 & 17, with correct relevant names substituted).

In support of the findings of the trial court and Fifth Circuit, Way refers the Court to the relevant evidence from the Printed Record and the additional original exhibits, now filed in this Court for the purposes of this hearing, as follows:

Uhlhorn made the prime contract with the FAA for Project FA-2-1578. He signed the contract as owner of Uhlhorn Construction Company. (Def Ex 2).

Uhlhorn S.A. made the contract with Way for its part of Project FA-2-1578. Uhlhorn signed as president of Uhlhorn S.A. (Def Ex 1). This contract identifies Uhlhorn S.A. as the "General Contractor".

Paragraph 5 of Way's Original Complaint (T 2) alleged:

"That in connection with the contract mentioned in paragraph "4". hereof defendant, Uhlhorn International S.A. caused surety defendant, National Surety Corporation to issue a payment bond binding each defendant herein unto the sum of Three Hundred Thirteen Thousand Four Hundred Fifty Four and 10/100 Dollars ($313,454.10) for the prompt payment of all persons supplying labor and materials in the prosecution of the work mentioned. A copy of said bond shall be offered at the trial of this action."

Both Defendants filed a joint answer to that complaint, which stated (T 5) as follows:

"Defendants admit the allegations contained in paragraph 5 of the complaint."

Paragraph 5 of Way's Amended Complaint (T 23) alleged:

> "That in connection with the contract mentioned in paragraph "4" hereof Uhlhorn Construction Company caused surety, defendant, National Surety Corporation to issue a payment bond binding the said defendant, National Surety Company unto sum of $313,454.10 for the prompt payment of all persons supplying labor and material in the prosecution of the work mentioned."

Surety's Answer (T 26) thereto, says:

> "The allegations contained in paragraph five of plaintiff's amended complaint are admitted."

Surety's and Uhlhorn S.A.'s attorney developed the following testimony of Mrs. Sampson, the former employee of Uhlhorn S.A., who was in charge of its office and who was conceded by Surety's counsel to have custody and possession of the records of Uhlhorn S.A. (T 102). She was the accountant for Uhlhorn S.A. from the very beginning, kept all of the books and records and entries of payments and disbursements, (T 147). Uhlhorn S.A. made all the disbursements on the contract, and gave Uhlhorn $17,000.00 for the rights in that contract, which transaction she entered in the books (T 148) as the assignment by Uhlhorn of the contract to Uhlhorn S.A. and payment therefor by Uhlhorn S.A. In the preparation of wage records for submission to the FAA, by Uhlhorn, she used information from the timekeeper in the field (T 149). She obtained the weekly payrolls from the subcontractors, such as Way, for the prime contractor and "the company then in turn incorporated these weekly payrolls and submitted them together with its payrolls to

the FAA." This was the obligation of the prime contractor (T 151). Way's payroll records were obtained and kept by Uhlhorn S.A., from whose files they were produced [(T 155) Plaintiff's Exhibit K; Defendant's Exhibits 3, 4 & 5, (T 156)].

Further testimony and evidence in the record is as follows:

> Plaintiff's Exhibit I produced from the files of Uhlhorn S.A. (T 150) contains 10 permits obtained from the FAA on Project FA-2-1578. These are issued in response to applications made on behalf of a contractor or subcontractor for the privilege of importing equipment or materials without duty (T 140). The applications were made by Uhlhorn Construction Company (T 110). Plaintiff's Exhibit I-10 shows the general contractor to be "W. B. Uhlhorn International, S.A." which commingles the name of the prime contractor and Uhlhorn International S.A. The balance of such applications and permits indicate W. B. Uhlhorn Construction Company is the contractor, do not anywhere list Uhlhorn International, S.A., as a subcontractor, but do on Plaintiff's Exhibits I-6 and I-8 show Way as a subcontractor of W. B. Uhlhorn Construction Company. On each of such applications the contractor's address is Box 611, Balboa, Canal Zone.
>
> Exhibit J, introduced without objection (T 118) and also stipulated to (T 116, 117, 118) by counsel for Surety and Uhlhorn S.A., is a file containing all the purchase orders and subcontracts on Project FA-2-1578 (T 114, 118) except for Defendant's Exhibit 1 (T 118, 119). As Surety's counsel said in his stipulation, "the records in Exhibit J speak for themselves . . . the documents themselves show what they purport to show".

The original papers of Exhibit J have been forwarded to this Court as a part of the record. Bulky as it is, examination will show the following:

1. Purchase orders on yellow forms of Uhlhorn S.A. P. O. Box 611, Balboa, Canal Zone.

2. Purchase orders on yellow forms of Uhlhorn Construction Company, with name blocked out and name and address of Uhlhorn S.A. substituted.

3. Purchase orders of each company bearing typed name or signature of W. B. Uhlhorn in lower right corner.

4. Bid from Masten-Wright Corporation to Uhlhorn Construction Co. with attached corresponding purchase order from Uhlhorn S.A., signed by W. B. Uhlhorn.

5. Subcontracts between Uhlhorn International, S.A. referring to it as the "general contractor" and *executed by W. B. Uhlhorn as President,* with the following sub-contractors:

H. I. Horne Co.—dated 9-26-60.

Vent Vue, S.A.—dated 9-26-60, with attached revision of Oct. 2, 1962, signed for Uhlhorn S.A. by "Reyburn L. Brown, Project Mgr."

Francisca Antonio Mariega—dated Jan. 28, 1962. (This contract, over the signature of W. B. Uhlhorn, recites that Uhlhorn, S.A.—the contractor —has entered into a contract of June 28, 1960, with Federal Aviation Agency for erection of ARTCC/IFSS Bldg. (See Defendant's Exhibit 2 —same contract).

J. Company E. Hijos, S.A.—dated June 28, 1960. (Same recitations as Mariega contract—above), signed for Uhlhorn S.A. by Tommie Carroll.

Standard Contractors, Inc.—dated 9-26-60, with attached bid from Standard Contractors of April

5, 1961 to W. B. Uhlhorn Construction Co.—Box 611, accepted for W. B. Uhlhorn Const. Co., 4-5-61, by Reyburn L. Brown, and corresponding pink purchase order from Uhlhorn S.A. "as per your quotation accepted by Reyburn L. Brown, Project Manager", and with attached contract revision signed for Uhlhorn International S.A. by Reyburn L. Brown, Project Manager.

Phillipine Rattan Furniture, Inc. — dated 4-5-61 (same recitations as Mariega & J. Co. de Higos —above) signed by Travis J. Wallace for Uhlhorn S.A., with attached bids to "W. B. Uhlhorn Construction Co.", dated 3/29/61 and 3/17/61.

Carlos M. Calero—dated 2-13-61.

L. H. Sommers—dated 2-22-60. (attached revision of 10-2-60 signed for Uhlhorn S.A. by Reyburn L. Brown, Project Manager.—Also revision of 5-9-61 from Uhlhorn S.A.—*signed by W. B. Uhlhorn,* with name of W. B. Uhlhorn Construction Corporation blocked out.)

Case International de Panama—dated 9-22-60.

Sebauste and Sebauste Cia — dated 9-17-60. (To this contract of Uhlhorn S.A. is attached purchase order of Uhlhorn Construction Co., 9-17-60, *signed by W. B. Uhlhorn.*)

Sebauste and Sebauste and Cia — dated 9-23-60, with attached purchase order of 9-23-60 from Uhlhorn S.A. or Uhlhorn Construction Co.—yellow form—name blocked out—and *signed for Uhlhorn by W. B. Uhlhorn.*

There are no other contracts, subcontracts or purchase orders in Plaintiff's Exhibit J between Uhlhorn Construction Company (or W. B. Uhlhorn) and Uhlhorn S.A.

6. Purchase order (green) of Uhlhorn Construction Co., Harlingen, Texas, dated 12-27-61 by "C. H. Turner" to Harrischfeger Corporation.

7. Purchase order (pink and green) of Uhlhorn S.A. signed by C. H. Turner: To Yarborough's Inc., dated 2-2-1962; to Hurricane Fence Co., dated 1-30-62; to Alamo Iron Works, dated 1-12-62; to Plowden Supply Co., dated 1-9-62; to Sika Chemical Corporation, dated 1-8-62, and 1-6-61; to Otto Dukes Co., dated 3-21-62 and 2-28-62; to Otto Dukes Machinery Co., dated 2-28-62; to National Gypsum Co., dated 3-6-62.

8. Purchase order (green) on form of Uhlhorn International Co. to Sika Chemical Corporation, dated 11-6-61, but signed Uhlhorn Construction Co. by C. H. Turner.

9. Purchase order (pink) of Uhlhorn Construction Co. to Sonneborn Brothers, Inc., dated 5-22-61, signed by W. B. Uhlhorn for material to be delivered to Uhlhorn S.A.

10. Purchase order (green) of Uhlhorn Construction Co. form (name blocked out) dated 3-23-61 to Palmer Building Supplies from Uhlhorn S.A., materials and equipment to be consigned to Uhlhorn Construction Co.

11. Pedidos (Orders—pink) to Brett R. Patton from W. B. Uhlhorn Construction Co., dated April 3, 1961, 2-6-61 and 3-21-61, OK'd by "Rey Brown". The latter signed for Uhlhorn Construction by Rey L. Brown.

12. Wire from Way to Uhlhorn S.A., attention W. B. Uhlhorn, dated 3-17-61.

13. Purchase order (tan form of Uhlhorn International S.A.) signed W. B. Uhlhorn to Way—dated Oct. 13, 1960.

14. Revision No. 2 to subcontract No. 61-1000-16 between Way Panama, S.A. and Uhlhorn S.A. signed by Reyburn L. Brown, Project Mgr. and dated Oct. 2, 1962.

15. *Revision #1 of Way sub-contract by Uhlhorn S.A. signed by W. B. Uhlhorn,* dated 5-9-61.

It is not clear to Way's appellate counsel whether all of the file marked K, in which Defendant's Exhibits appear, is in evidence, though treated as part of the record. (T 131, 149, 150, 151, 152, 165, 297). If so, it appears therefrom that Reyburn L. Brown is listed as Project Manager of W. B. Uhlhorn Construction Company for payrolls 1 through 7, and also as Project Manager for Uhlhorn International S.A. on Addition to Payroll 7.

ARGUMENT

The trial court and the Fifth Circuit correctly applied the provisions of the Miller Act to the evidence before it in holding that Respondent was not required under such Act to give notice to Uhlhorn individually, since by his own acts he had inextricably entwined his individual identity with his corporate alter ego, Uhlhorn, S.A., which he expressly represented to Respondent and others was the *prime* contractor, and Uhlhorn and his surety were estopped by the acts and representations of Uhlhorn and his employees and representatives to urge that Uhlhorn individually as a prime contractor was entitled to written notice from Respondent of Respondent's claim.

Respondent knows of no decisions of any United States Circuit Court of Appeals which conflict with that in the cause below, upon the evidence before the Court, and

submits there is no special or important reason why this cause, under the undisputed facts, needs further review, since the decisions below are consistent with well known principles of equity and the statutory law.

It is clear that Uhlhorn as president of Uhlhorn, S.A. (whom he induced Way to believe was the general or prime contractor on the contract, as expressly represented by Uhlhorn), was at all times on notice or in position to know the exact status of the account due Way, and required no further notice thereof.

Surety in its Reply Brief, filed in the Fifth Circuit, strongly relied upon the Texas case of *Sutton v. Reagan & Gee* (Texas Civ. App., 1966), 405 S.W.2d 828 (writ of error refused by Texas Supreme Court, no reversible error, 1967), which Way agrees graphically sets out grounds for imposing liability upon the appropriate party who seeks to hide behind a corporate veil.

At pages 836, 837, Judge Carlos Cadena set out these grounds or elements as follows:

> "It is a basic rule of law of corporations that the shareholder is ordinarily insulated from personal liability arising from the activities of the corporation. This insulation from personal liability is said to be the natural consequence of the incorporation process, and is supported by the theory or "fiction" that incorporation results in the creation of an "entity" separate and distinct from the individual shareholders. But the courts have not allowed this concept of a separate entity, useful though it may be in facilitating the achievement of results considered economically desirable, to allow individuals to make use of the corporate form in order to engage in conduct and bring about results which are considered to be in

violation of important principles of public policy. In certain cases, the courts, in order to deny insulation from liability, will "disregard" the "corporate entity" which they themselves have created or, speaking more colorfully, will "pierce" the corporate "veil" which the courts have made available to shareholders for use as a shield from personal liability.

In Pacific American Gasoline Co. of Texas v. Miller, Tex. Civ. App., 76 S.W.2d 833, wr.ref., it was said that the corporate form will be disregarded (1) where it is used as a medium for the perpetration of fraud; (2) where the corporation is organized or conducted as the mere "tool" or "business conduit" of another corporation; (3) where resort is made to the corporate fiction in order to avoid an existing legal obligation; (4) where the corporate form is used to achieve or perpetuate monopoly; (5) where the corporate structure is used as a vehicle for circumventing a statute; or (6) where the fiction is invoked in order to protect crime or justify wrong.

The opinions are replete with statements to the effect that the shareholder will be held liable where he "dominates" the corporation; or where the corporation is a "subterfuge", or "mere creature" or "mere instrumentality" of the shareholder; or where it is a "dummy", "alter ego", "sham", "tool", "buffer", "business conduit", "agent", etc. of the shareholder * * *

* * * Whether or not a shareholder will be insulated from personal liability should depend on the use, or misuse, which that shareholder is making of the corporate form. The only shareholders who should be held personally liable are those who have used the corporation to bring about results which are condemned by the general statements of public policy which are enunciated by the courts as "rules" which determine whether the courts will recognize their own child * * *"

Way submits that the evidence above detailed, and the trial court and Fifth Circuit findings therefrom, clearly and fully supply the elements or grounds which *Sutton v. Reagan & Gee*, and many other decisions, rely upon in imposing liability upon the real party who brings about such circumstances, then attempts to avoid them by a corporate cloak.

The purpose of the Miller Act is to provide security for those who furnish labor and material in the performance of government contracts, and a liberal construction should be given to accomplish this purpose. *Fanderlik-Locke Co. v. U. S., supra*, P. 940, 941; *Indemnity Ins. Co. of N. A. v. Browning Ferris Machinery Co.* (5th Cir. 1955), 227 F.2d 804; *Boyd Callan, Inc. v. U. S. for use of Steves Industries, Inc.* (C.A. Tex. 1964), 328 F.2d 505; *Standard Accident Ins. Co. v. U. S. for use of Powell* (Fla. 1938), 58 S.Ct. 314, 302 U.S. 422, 82 L.Ed. 350; *Coffee v. U. S. for use of Gordon* (Fla. 1946), 157 F.2d 968.

Surety contends (Sur Br 25) that the assignment to Uhlhorn, S.A. was void, relying upon the provisions of Title 40 U.S.C.A. sec. 15, which was repealed Oct. 31, 1951 c. 654, § 1 (80), 65 Stat. 704. If the assignment was void, then Way was dealing with Uhlhorn when he made the agreement with Way for Uhlhorn S.A.

Where the prime contractor's assignment did not damage the surety on his bond, no creditor of the contractor is estopped from asserting his rights against the surety;

"There is no substantial difference in the legal relation, and therefore none in the rights, of materialmen dealing with a subcontractor and those dealing with an assignee, if the assignment has not been sanctioned by the gov-

ernment. From the standpoint of the materialmen, such an assignment is, in effect, but a subletting; the original contract remains in full force; the original contractor is still responsible for the undertaking.

It follows, therefore, that all of the claimants who supplied material or labor for the work covered by the contract, either to the original contractor or to the assignee, and whether with or without knowledge of the assignment, were entitled to the full benefit of the bond, the statutory substitute for a lien, unless by some act of his own, one or the other claimant may have released or waived or may be estopped from asserting his right." *U. S. for use of Davis v. Illinois Surety Co.* (7th Cir. 1915), 226 F. 653 (P 660), affirmed 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206.

A surety on a bond of a partnership as prime contractor is not released from liability thereon for the claim of one who supplied labor or materials in the prosecution of the work because of the fact that other persons were associated with the firm as partners in carrying out the contract. *City Trust, Safe Deposit & Surety Co. v. U. S.* (N.Y. 1906), 147 F. 155.

By signing the contract, purchase order, and revision with Way, as President of Uhlhorn, S.A., the contractor, Uhlhorn, expressly and impliedly authorized Uhlhorn, S.A. to make such agreements for him.

A contractor for public work can waive the 90-day notice required prior to action on the contractor's bond, especially if he has all the information which the notice would otherwise give him, or deals directly with those who might otherwise be expected to give notice, and if he impliedly assumes subcontractors contract, directs work,

and promises payment to those doing work if they will continue, his liability becomes fixed, and his surety's liability is co-extensive with his. The 90-day notice contemplated is to the contractor, not the surety. *U. S. for use of Korosh v. Otis Williams & Co.* (D.C. Idaho 1939), 30 F. Supp. 590.

Any person having a direct contractual relationship with a subcontractor and also having a contractual relationship, express or implied, with the contractor furnishing the payment bond, has a right to sue upon the bond without being required to give written notice within the 90-day period. *American Cas. Co. of Reading v. Southern Materials Co.* (C.A. Va. 1958), 261 F.2d 197.

It is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor, and when this appears, the object of Title 40 U.S.C.A. sec. 270b, to assure the contractor will have notice, is attained, and the section is sufficiently complied with. *Houston Fire & Cas. Co. v. U. S. for use of Trane Co.* (5th Cir. 1954), 217 F.2d 727.

The Fifth Circuit, in concluding that, with respect to the FAA contract, the proprietorship, W. B. Uhlhorn Construction Company and Uhlhorn International, S.A., were operated essentially as one entity, namely, the prime contractor, referred to the following cases involving claims against a prime contractor or its surety: *Markow v. Alcock,* 356 F.2d 194, 197-198 (5th Cir. 1966); *United States for use of Korosh v. Otis Williams & Co.,* F. Supp. 590, 593 (D. Idaho 1939, and compared the decisions of *United States for the use of Teichert & Son, Inc. v. Anchor Contractors, Inc.,* 257 F.Supp. 474 (N.D. Cal.

1966); *United States for the use of Westinghouse Elec. Supply Co.*, 125 F. Supp. 25 (D. Mass. 1954). (Pet Appendix 17).

SUMMARY

The above cited testimony and evidence before the Court without valid objection, and the above cited authorities, make it clear that Uhlhorn combined and commingled his activities, employees, equipment, material and funds as prime contractor with Uhlhorn International S.A., of which he was President, whose personnel were intermingled and joint with his, to which he personally assigned the contract, and which he personally held out to sub-contractors as the general contractor and as having "entered into a contract dated June 25, 1960 with Federal Aviation Agency . . . for the erection . . . of ARTCC/IFSS Building, Balboa . . .," as did other officers of Uhlhorn S.A., which, by the assignment as well as its combined acts with Uhlhorn, became the prime contractor with him, was no more than an alternate guise or cloak of the prime contractor, who used its name and firm as a part of his organization and his alter ego. Since, as the Trial Court and Fifth Circuit found, Uhlhorn and Uhlhorn, S.A. conducted themselves in a joint venture as an entity and as the prime contractor, who expressly and impliedly contracted with Way, there was no subcontractor dealing with Way, and, in order to sue on the bond of Surety, Way was not required to give a 90-day notice to Surety under the provisions of Title 40 U.S.C.A. sec. 270 b. Since the prime contractor, W. B. Uhlhorn, signed the contract with Way himself, and its revision May 8, 1961 (Pl Ex J), and also signed the purchase order to Way, he had written notice of its contract and claim for

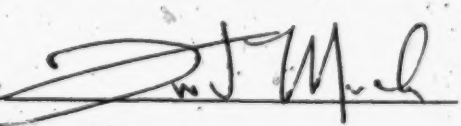
materials and services at all times material. It is clear also that the prime contractor consented to have Uhlhorn International S.A. act on his behalf and in his stead, and that Uhlhorn S.A. consented so to act and did so.

Whatever theory the Trial Court relied upon, assignment, agency, commingling, piercing the corporate veil, et cetera, the evidence bears out the requirements of the Miller Act, that Way had an express or implied in fact contractual relationship with the prime contractor, dealt directly with him and his representatives, and need give him no further notice before recovering against Surety on its bond under the Miller Act, 40 U.S.C.A. sec. 270 b (a).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. Respondent prays for such ruling; that the judgment of the United States Court of Appeals for the Fifth Circuit be sustained; for costs and for such other relief to which it is entitled.

Respectfully submitted,

By: 

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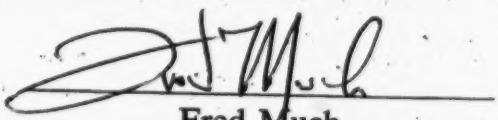
CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief of Respondent in Opposition to the Petition on Writ of Certiorari was made upon Petitioner's Attorney of Record by mailing a copy thereof, postage prepaid, to Dayton G. Wiley; Wiley, Thornton & Plumb; 10th Floor, Kallison Tower Building; 1222 North Main Avenue; San Antonio, Texas 78205, on November 22, 1967.



Fred Much